UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

LEIGH ANNE GREENMAN, Plaintiff,	:	
v.	:	C.A. No. 15-04ML
METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Invoking the Rhode Island Civil Rights Act, R.I. Gen. Laws §§ 42-112-1, 2 ("RICRA"), and the Family and Medical Leave Act, 29 U.S.C. § 2615(a) ("FMLA"), Plaintiff Leigh Anne Greenman claims that she was selected to be laid off in a reduction-in-force implemented by Defendant Metropolitan Property and Casualty Insurance Company ("MPC") because she was pregnant and in retaliation for taking her FMLA leave, as well as that MPC interfered with her right to FMLA leave by implementing the lay-off two weeks before the leave would have ended. MPC counters that Plaintiff was selected to be laid off because she was the entry level employee with the least relevant experience in her group, and that she has failed to proffer any probative evidence of pretext masking discriminatory intent. MPC's motion for summary judgment (ECF No. 20) has been referred to me for report and recommendation. 28 U.S.C.§ 636(b)(1). For the reasons that follow, I recommend that it be granted.

I. BACKGROUND[1]

MPC is a Rhode Island corporation licensed as a personal lines property and casualty insurer operating in Warwick, Rhode Island. Approximately 360 people worked at MPC's

[1] These facts are culled from the evidence cited by the parties in their DRI LR Cv 56(a) statements. They are undisputed unless described as disputed in the text.

Warwick office during 2012 and 2013, the relevant period. During the same period, the working group in issue in this case – the product marketing group – employed approximately fifteen employees. The product marketing group was run by Robert Lundgren, vice president of marketing. See generally DSUF ¶¶ 1-10.

For most of the period, manager (later director) of product marketing, John Delemontex, reported to Lundgren and supervised a team of eight marketing professionals. DSUF ¶ 7; Duchala Exh. 10. From approximately October 2010 until June 2011, Delmontex was sent to work in a different department on a temporary assignment; while he was gone, one of his reports, senior marketing consultant Kerri Gulesserian, temporarily assumed certain of his supervisory responsibilities. Delemontex Decl. ¶ 14. In July 2011, Delemontex returned to the product marketing group when Gulesserian commenced an FMLA leave following the adoption of her first child. PSUF ¶ 88; Delemontex Decl. ¶ 15. Delemontex was "slightly disappointed" that Gulesserian's FMLA leave required him to end the special assignment sooner than he had expected. PSUF ¶ 89; Delemontex Dep. 126. When Gulesserian returned from her first FMLA leave, she went back to her original job. PSUF ¶ 91. On her return, she told Delemontex that she was newly pregnant and would be going out on a second pregnancy-based FMLA leave in 2012. PSUF ¶ 90. In January 2012, in between her first and second FMLA leaves, Gulesserian was promoted to manager and given the responsibility of supervising a few of her coworkers, including Plaintiff. PSUF ¶ 94. She continued to report to Delemontex. Id.

The least senior position in the product marketing group supervised by Delemontex was that of marketing analyst. Greenman Dep. 131. Marketing analyst is an entry-level job requiring at most two years of experience and a bachelor's degree in marketing or a related field or equivalent experience; because it is an entry level position, a marketing analyst performs task-

based assignments which generally require some supervision. Greenman Dep. 130; Delemontex Decl. ¶ 10; Gulessarian Exh. 1; see PDSF ¶ 12. Other professional positions in the product marketing group, in ascending order, classified based on the tasks expected and the level of education and experience required, were marketing consultant I, marketing consultant II, senior marketing consultant, and senior marketing consultant II. DSUF ¶ 10-11. In addition to its core team of professionals, the product marketing group was supported by an administrative assistant, and often relied on independent contractors and workers ("temps") from temporary agencies. PSUF ¶ 136-45; PDSF ¶ 11.

Plaintiff first worked at MPC's Warwick office in 2007 as a temp. PSUF ¶ 74. In July 2009, MPC hired her to work in the product marketing group as an entry level marketing analyst. PSUF ¶ 75. Plaintiff was the only marketing analyst in the group. Greenman Dep. 131. According to her MPC job application, Plaintiff's qualifications were limited to her work as a temp at MPC, in that she had no education beyond a high school diploma and little other relevant work experience. ECF No. 34-3 at 21-24. Plaintiff consistently received positive evaluations of her work: "on target," "met objective," "met objective partially," "successful contributor," "a lot of progress," "[a]s usual great job," "[w]ell done!" ECF No. 34-6 at 12-19; PSUF ¶ 77; Delemontex Exh. 1-2, 7. Her supervisor Delemontex praised her work. Delemontex Dep. 52-53 ("Leigh, however, picked it up and ran with it."). She believes that she was able to work on projects without supervision. PDSF ¶ 12. At the same time, her evaluations urged her to "execute your development plan to go back to school," "grow[] in consultative and follow up skills and be more proactive in understanding roles, projects and programs," "re-visit plans to continue her marketing education." ECF No. 34-6 at 12-19; Delemontex Exh. 1-2, 7. Plaintiff

was never disciplined or given any warning. PSUF ¶ 81. Plaintiff reported to Delemontex, either directly or through Gulesserian. See PSUF ¶ 82, 85.

In early 2012, MPC directed Lundgren to develop an expense reduction plan as part of a larger corporate reorganization; he was required to come up with cuts amounting about 8% or $800,000. DSUF ¶¶ 15-18; see PSUF ¶ 92-93. Lundgren had discretion how to achieve the reduction. DSUF ¶ 19. Because he lacked direct knowledge of the employees in the product marketing group, Lundgren made the decision as to which programs and personnel to cut in consultation with Delemontex. DSUF ¶ 22; PSUF ¶¶ 104, 106.

Just before Gulesserian's second FMLA leave started on March 16, 2012, and two months after she was promoted to manager, Plaintiff claims that Gulesserian told her that either Lundgren or Delemontex offered a "demotion" and a pay cut to be implemented when Gulesserian returned from the leave. Greenman Dep. 69. Plaintiff testified that she understood that Gulesserian rejected the offer and returned to the same position after the leave. Greenman Dep. 66-69. Gulesserian denies making this statement. Gulesserian Dep. 59. To the contrary, Gulesserian testified that she was promoted again when she returned from the second FMLA leave in that her compensation was increased; she was reporting directly to Lundgren; she was no longer under Delemontex's supervision; she no longer had the responsibility to supervise coworkers in Delemontex's group; and she was given a new project based on her expertise in group distribution. Gulesserian Dep. 101-03, 106.

Lundgren, with Delemontex's assistance, focused on the reduction plan in "the last week or two of March" 2012. Lundgren Dep. 56. He decided to lay off three employees in the product marketing group. The first was to be chosen from another part of Lundgren's department, while the other two were to be selected from among the product marketing group

reporting to Delemontex. Lundgren Dep. 54-57. According to Lundgren, the three selections were based on his judgment as to what would have the least negative impact, mindful of MPC's strategic goals for the focus of the business. Lundgren Dep. 52-53. From outside the Delemontex group, Lundgren chose a male employee for lay-off. PSUF ¶ 119. From within the Delemontex group, one of the two selected was a senior male employee with serious performance issues. PSUF ¶ 116.

For the third employee, Lundgren testified that he decided to choose "the least senior of the marketing team in terms of marketing experience." PSUF ¶ 120. He explained that he tentatively chose Plaintiff, with Delemontex's input, because she fit this criterion as the only marketing analyst in the group. Lundgren Dep. 57; see Lundgren Dep. 60 ("Really, it was all experience. Leigh Anne was the junior of the team and had the least amount of marketing experience."). Delemontex's testimony is similar: "at the end of the day the decision to cut folks . . . is really based on knowing I have more work to do with less resources. And I had to select the folks who I thought I could . . . achieve those objectives with. . . . I needed a more skilled team around me in order to . . . move forward." Delemontex Dep. 149-51; PSUF ¶ 121.

As Lundgren and Delemontex were struggling with these decisions, in early April 2012, Plaintiff told Delemontex that she was twelve weeks pregnant. Greenman Dep. 51-52; PSUF ¶ 100. Delemontex told Lundgren. PSUF ¶ 103. When she told Delemontex, he did not congratulate her; his tone was curt. PSUF ¶ 101. With Gulesserian already out on FMLA leave for the birth of her second child, Delemontex told Plaintiff to discuss her plans for her own FMLA leave with Gulesserian when she returned. PSUF ¶ 102. Meanwhile, Lundgren continued to think about whether to choose Plaintiff to be laid off until late April 2012; before finalizing the decision, he questioned Delemontex about whether the administrative assistant

(Diane Lang) should be considered instead. Lundgren Dep. 59 & Exh. 4; PSUF ¶¶ 122-23, 125. Lang was not pregnant. PSUF ¶ 132. After Delemontex pointed out that Lang provided administrative support for many people, "not only his team but to our entire team" and that she performed work that could not be transferred to anybody else, Lundgren ruled her out. PSUF ¶ 129. He advised the human resources department of his three choices on April 23, 2012. Lundgren Dep. 59 & Exh. 4.

During the lay-off selection process, Lundgren did not review any job performance data, including the evaluations of Plaintiff or any other worker in the product marketing group, and did not confer with Gulesserian; he relied on Delemontex's recommendations. PSUF ¶¶ 104-06, 130. Lundgren took no special steps to ensure that Delemontex's input about Plaintiff was free from bias based on pregnancy, explaining that "I know John very well," and that Delemontex's statements about his reasons for selecting Plaintiff focused only "around experience and . . . the strategic focus on less retail, more group," and had nothing to do with [illegal bias]." Lundgren Dep. 130-32; PSUF ¶ 147.

The final step in the lay-off selection process was to present the decision to MPC human resources ("HR") and legal departments. PSUF ¶ 150. The role of HR is to hear the business case for the decision, but not to do any independent investigation unless something seems "not right." PSUF ¶ 151. The meeting with HR was held on April 30, 2012. PSUF ¶¶ 152, 165. Neither Lundgren nor Delemontex advised HR that Plaintiff had recently announced that she was pregnant. PSUF ¶ 159; Duchala Dep. 68-69. In the HR memorandum summarizing the business case for the lay-off selections, Duchala confirmed that the product marketing group would be "reducing marketing support" and that the group from which selections were to be made was the

"8 associates in the business unit" (which did not include the administrative assistant). Duchala Exhs. 6, 10. Regarding the reasons for the selection of Plaintiff, the HR memorandum states:

> The nature of some of the work performed by this individual has been determined to be discretionary, as it involves promotional/sponsor work and supporting others on the team with second tier clients. Going forward some of this work will be reassigned and some of the work will no longer be done. Overall this associate's development has not shown sufficient progress to support the business in the future.

Duchala Exh. 6.[2] Confirming her memorandum, Duchala's handwritten note states, "[h]asn't progressed to where she should . . ." PSUF ¶ 153.

The layoffs were scheduled to take place on the morning of Monday, May 21, 2012. PSUF ¶ 167. On the Friday before, aware only of the rumors that layoffs were imminent but not that Plaintiff had been selected, Gulesserian, who was home on FMLA leave, telephoned Delemontex and told him that Plaintiff's spouse, who worked for an MPC contractor, was about to be laid off. PSUF ¶ 176; Delemontex Decl. ¶ 22; Gulesserian Dep. 79. Gulesserian testified that she made this call because Plaintiff had called her while she was on FMLA leave and "characterized it that [her husband] was going to be laid off." Knowing that lay-offs were coming in her own department, Gulesserian wanted Delemontex to be aware of the information. Gulesserian Dep. 78-80. Plaintiff denies that she made such a statement to Gulesserian; in fact, no adverse action affecting Plaintiff's husband's employment was ever taken. PSUF ¶ 181.

Delemontex testified that, as soon as he heard from Gulesserian, he immediately relayed the information to HR and to Lundgren. PSUF ¶¶ 176-77. Lundgren recalls that the head of HR, Vhonda Ridley, told him she "had received a list of the people being terminated" and that Plaintiff's husband was on it"; in discovery, MPC conceded that such a list could not be found. PSUF ¶¶ 177, 180; Lundgren Dep. 101. For HR, this was the first that it became aware of

[2] Plaintiff argues that this memorandum states that Plaintiff was chosen because her "performance was not meeting expectations." PUSF ¶ 153. The Court has scoured the memorandum in vain for such a statement or sentiment.

Plaintiff's pregnancy. PSUF ¶¶ 183-84. Lundgren testified that the information about Plaintiff's husband caused him to become concerned as to the effect of the loss of income to both Plaintiff and her spouse at the same time. PSUF ¶ 179; see Lundgren Dep. 105 ("two people in a family losing their jobs in the same day is devastating. I didn't think that would be appropriate for us to do"). Lundgren decided to delay Plaintiff's layoff until after she returned from maternity leave. PSUF ¶¶ 173, 185. Ridley, the head of HR, concurred:

> I think the sensitivity on the part of HR and the business was hearing through the grapevine or hearing that, in fact, her husband had been let go and then factoring in from a humanistic perspective because, you know every situation is different and then, oh, my gosh, she's pregnant, and if she gets terminated as well, she's going to lose her benefits. I mean, that was the gist of it.

Ridley Dep. 60; see PSUF ¶ 178 ("we're still human, having some empathy towards folks here"). This delay was contrary to various MPC policies, including the requirements that, in implementing lay-offs, the last day worked should be fixed and not changed and that an FMLA leave should not impact the lay-off date; the parties also dispute whether HR filed the correct form to memorialize the postponement. PSUF ¶¶ 186-88, 194.

The other lay-offs were implemented on May 21, 2012, as scheduled. PSUF ¶ 172; Delemontex Decl. ¶ 26. Plaintiff continued to come to work, not knowing she had been selected to be laid off, right up until the birth of her child on October 5, 2012. PSUF ¶¶ 198, 208. Awkwardly, in the September 2012 announcement about work assignments, Plaintiff was described as continuing "to provide the day-to-day services" together with Lang. PSUF ¶¶ 204, 206-07. Before her leave began, Plaintiff claims that Gulesserian, who had recently returned from her own FMLA leave and was unaware that Plaintiff had been selected for lay-off, advised her to save all of her documents and "never trust a corporation"; according to Plaintiff, Gulesserian appeared distraught." PSUF ¶ 201; Gulesserian Dep. 70-71. Gulesserian does not

recall making this statement. Gulesserian Dep. 59. Immediately after the birth of her child, Plaintiff was approved for short-term disability leave until November 15, 2012, and FMLA leave through January 8, 2013, of which the portion through December 3, 2012, was "parental leave" with full pay. PSUF ¶¶ 209, 212.

After Plaintiff went out on leave, Lundgren and HR had further discussions about whether her lay-off should be implemented before the end of 2012, rather than after she returned in early 2013. PSUF ¶ 213. According to Lundgren, he became aware that an enhanced severance program (paying ninety days of compensation) was available only for employees laid off during 2012. Lundgren Dep. 137-38; Delemontex Decl. ¶ 29. In his deposition, he explained that he directed HR to compare the financial impact on Plaintiff of being laid off at the very end of 2012 with the financial effect of being laid off in January 2013; based on its analysis, he learned that a late 2012 lay-off would be significantly better financially for Plaintiff. Lundgren Dep. 137-38; accord Duchala Dep. 77-78 ("she was scheduled to come back in January, and I think that the discussion at that point was that it would be to her benefit if we notified in December versus January"). On October 23, 2012, Lundgren advised HR of his decision, made together with Delemontex, that Plaintiff should be laid off as of December 21, 2012. PSUF ¶ 214. Delemontex called Plaintiff on December 14, 2012, to give her this news; she had her newborn in her arms as she took the call. PSUF ¶ 218. Her reaction was exacerbated because she believed that she was safe while she was on FMLA leave. Greenman Dep. 146.

It is undisputed that Plaintiff received significant financial benefits as a result of the delay in the layoff from May 21, 2012, until December 26, 2012, Greenman Dep. 170, 174-76, 196-97, as well as that it was financially better for her to be laid off in December 2012, instead of in January 2013. Greenman Dep. 201-04.

When the dust of 2012 settled, Lundgren tallied up and learned that his 2012 cuts fell $80,000 short of the goal of $800,000. Lundgren Dep. 108-09. The delay in Plaintiff's lay-off, including the cost of her paid parental leave, adversely affected Lundgren's ability to reach his goal. PSUF ¶ 190. No one was hired by MPC to replace Plaintiff;[3] however, some or all of Plaintiff's work continued to be performed by other, now overworked, employees. Temps and independent consultants continued to be used to assist the department, including temps brought in to assist some of the workers to whom Plaintiff's work had been allocated. PSUF ¶¶ 222-27.

Stripped to the bone, the undisputed evidence establishes that, during 2012 when the lay-off selections were made, the product marketing group consisted of eight professionals, five women and three men; of the women, two were pregnant. See Duchala Exh. 10. Lundgren and Delemontex selected one male and one pregnant female for lay-off. Gulesserian, who was pregnant and out on her second FMLA leave in less than two years, was not laid off; rather, she was promoted, although she stopped supervising some of Delemontex's team when she stopped reporting to him. See PSUF ¶ 240.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56, summary judgment is appropriate if the pleadings, the discovery, disclosure materials and any affidavits show that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Taylor v. Am. Chemistry Council, 576 F.3d 16, 24 (1st Cir. 2009); Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006) (quoting Fed. R. Civ. P. 56(c)). A fact is material only if it possesses the capacity to sway the outcome of the litigation; a dispute is genuine if the evidence about the

[3] Plaintiff tries to counter this fact with speculation regarding the timing of a new hire, at the level of marketing consultant II, by the product marketing group. PUSF ¶ 195. Apart from the fact that this individual's experience level meant he could not be a replacement for Plaintiff, the objective evidence establishes that he joined the product marketing group before the lay-offs. Duchala Exh. 10.

fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. Estrada v. Rhode Island, 594 F.3d 56, 62 (1st Cir. 2010). The evidence must be in a form that permits the court to conclude that it will be admissible at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "[E]vidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Vasconcellos v. Pier 1 Imports (U.S.) Inc., C.A. No. 06-484T, 2008 WL 4601036, at *3 (D.R.I. Apr. 28, 2008).

In ruling on a motion for summary judgment, the court must examine the record evidence in the light most favorable to the nonmoving party; the court must not weigh the evidence and reach factual inferences contrary to the opposing party's competent evidence. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014). In employment cases, summary judgment is appropriate when the party opposing the motion "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000); Bonilla v. Electrolizing, Inc., 607 F. Supp. 2d 307, 314 (D.R.I. 2009). The motion must be denied if there is sufficient evidence from which a reasonable jury could infer that the adverse employment action was based on discriminatory animus or that the employer's articulated reason is a sham and the true reason is discriminatory. Trainor v. HEI Hosp., LLC, 699 F.3d 19, 28 (1st Cir. 2012); Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996).

III. ANALYSIS

A. Count I – Plaintiff's RICRA Claim that She Was Selected for Lay-Off Because of Pregnancy

The Rhode Island Civil Rights Act prohibits employers from taking an adverse employment action against an employee on the basis of the individual's sex, including on the

basis of pregnancy, childbirth, or related medical conditions. Mayer v. Prof'l Ambulance, LLC, C.A. No. 15-462 S, 2016 WL 5678306, at *5 (D.R.I. Sept. 30, 2016) (citing R.I. Gen. Laws § 28-5-6). The Rhode Supreme Court has provided content to the state employment discrimination statutes, including RICRA, through the adoption of the federal legal framework. Neri v. Ross-Simons, 897 A.2d 42, 48 (R.I. 2006). In a case like this one, with no "smoking gun" to establish that pregnancy bias animated Plaintiff's selection for lay-off, the Court is guided by the three-step, burden-shifting framework in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973).

The first McDonnell Douglas step requires the plaintiff to shoulder the four-pronged burden of adducing a *prima facie* case. The first three prongs require a showing that: (1) as a pregnant woman, the plaintiff is a member of a protected class; (2) the employer took an adverse employment action against her; (3) and she was performing her job at an acceptable level. Smith, 76 F.3d at 421. The fourth prong looks for evidence that the plaintiff was replaced by a person with similar qualifications. Id. In a reduction-in-force case, the First Circuit has acknowledged an alternative way to satisfy the fourth prong – by "producing some evidence that [the] lay-off occurred in circumstances that would raise a reasonable inference of unlawful discrimination." Dunn v. Trs. of Boston Univ., 761 F.3d 63, 68 (1st Cir. 2014) (quoting Sullivan v. Liberty Mut. Ins. Co., 825 N.E. 2d 522, 533-34 (D. Mass. 2005)). Evidence sufficient to establish a *prima facie* case creates a presumption of discrimination and moves the analysis to the second McDonnell Douglas step, where the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the adverse action.

If the employer can clear step two, at the third and final step, the burden devolves again on the plaintiff to prove that the employer's reason not only is a sham or mere pretext, but also that the true reason is unlawful discrimination. Vasconcellos, 2008 WL 4601036, at *4 (citing

Smith, 76 F.3d at 421). This requires a showing by a preponderance of the evidence, which may include circumstantial proof. Young v. United Parcel Serv., Inc., 135 S. Ct 1338, 1354-55 (2015). Pretext can be proven by evidence showing "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000) (quoting Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 168 (1st Cir. 1998)). Ultimately, the court must consider whether "there is a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination." Ahmed v. Johnson, 752 F.3d 490, 497 (1st Cir. 2014) (quoting Holland v. Gee, 677 F.3d 1047, 1056 (11th Cir. 2012)). "[P]retext for discrimination means more than an unusual act; it means something worse than a business error; pretext means deceit used to cover one's tracks[,] . . . something that is put forward to conceal a true purpose or object." Ronda-Perez v. Banco Bilbao Vizcaya Argentaria-Puerto Rico, 404 F.3d 42, 45 (1st Cir. 2005) (inside quotations omitted).

The parties spar over whether Plaintiff can establish a *prima facie* case. Citing the district court decision affirmed by Dunn, 761 F.3d 63, MPC concedes that she easily clears the first three prongs but argues vociferously that, with no showing that she was replaced and no circumstances that would raise a reasonable inference of unlawful discrimination, her showing on the fourth prong is so skimpy that the analysis can stop there. Dunn v. Trs. of Boston Univ., C.A. No. 11-10672-DPW, 2013 WL 5235167, at *3-4 (D. Mass. Sept 16, 2013) (citing Domenichetti v. Premier Educ. Grp., LP, No. 12-CV-11311-IT, 2015 WL 58630 (D. Mass. Jan. 5, 2015), Plaintiff counters that, despite the lack of evidence of replacement, she easily clears the "relatively light" *prima facie* hurdle in that an inference of discrimination arises (1) because of the temporal proximity between her announcement that she was pregnant and Lundgren's

decision to select her for lay-off and (2) because MPC treated non-pregnant employees differently in that the administrative assistant and three of the other four women in the product marketing group were not laid off.[4] Id. at *4. With the *prima facie* test so framed, Plaintiff argues that she easily sails over. Domenichetti, 2015 WL 58630, at *9-10.

For purposes of this analysis, the Court will presume that Plaintiff's *prima facie* case is sufficient. The Court further finds that MPC has met its limited burden of articulating a legitimate, non-discriminatory reason for selecting Plaintiff to be laid off in that MPC's decision to cut costs through lay-offs implemented in 2012 is undisputed. MPC has also presented competent evidence that Lundgren and Delemontex selected Plaintiff to be laid off because she was the least experienced member of the product marketing team, most lacking the skills Delemontex believed he needed to "move forward." Delemontex Dep. 149-50; see Furr v. Seagate Tech., Inc., 82 F.3d 980, 985 (10th Cir.1996), cert. denied, 519 U.S. 1056 (1997).

With these preliminaries completed, the Court's next task is to examine whether Plaintiff's proof of pretext permits the reasonable inference that she was really chosen because she was pregnant and not because, as MPC maintains, she had the least experience and skills. As in Ronda-Perez v. Banco Bilbao, Plaintiff attempts to establish the necessary evidence of pretext by "firing a spirited volley," with the hope that the result will not just be smoke but also real fire. 404 F.3d at 45. In a nutshell, she contends that her factual proffer permits a fact finder to conclude that pregnancy was the basis for the decision to select her for lay-off based on the following inferences,[5] which arise from the following summarized facts:

[4] In forging this link of her argument, Plaintiff buries in a footnote the other pregnant employee, Gulesserian, who was not laid off. With this sleight of hand, her analysis concludes that "[a]ll seven of [Plaintiff's] colleagues on Mr. Delemontex's team . . . who were not chosen for termination were not pregnant." ECF No. 34-1 at 24.
[5] The parties set these out as "six" inferences. The Court has collapsed six into four to address them more efficiently.

- The Selection Criteria Were Falsified and Manipulated. HR's memorandum reflects criteria different from those used by Lundgren and Delemontex in that it states that "[o]verall this associate's development has not shown sufficient progress to support the business in the future," yet Plaintiff's performance was consistently acceptable. Further, Diane Lang, the administrative assistant, met the criterion of "the least senior of the marketing team in terms of marketing experience," yet she was not pregnant and was not chosen to be laid off.

- "Cover-Up" of Pregnancy in HR Meeting and of HR's Decision to Delay Lay-Off. During the April 2012 HR meeting to review the business case for the selections, Lundgren and Delemontex did not tell HR that Plaintiff was pregnant. When HR discovered the pregnancy in May 2012, HR director Ridley concluded that Plaintiff's lay-off should be postponed. The reason given for the delay – that Plaintiff's husband was being laid off – was concocted in that Plaintiff's husband's position was not eliminated.

- Plaintiff's Work Continued to be Performed. Plaintiff's work was reallocated to other employees, at least one of whom needed one or more temps to assist her. After the lay-offs, MPC continued to use temps to help out the product marketing group.

- The Other Pregnant Employee Was Subjected to Disparate Treatment. Just as the lay-off selections were being made, another pregnant MPC employee, Gulesserian, told Plaintiff she was offered (but rejected) a demotion. Further, after she returned from the leave, Gulesserian did not resume the supervisory role she had filled while reporting to Delemontex.

Plaintiff argues that her supporting evidence of each inference is substantial, and not "conjectural or problematic," improbable, speculative, or conclusory. Vasconcellos, 2008 WL 4601036, at *3-4. Therefore, she contends, this Court must deny MPC's motion for summary judgment and allow the case to proceed to trial. MPC disagrees. It asks the Court to examine both the admissible evidence underlying each inference and the relationship between the inference and discriminatory animus; it contends that under scrutiny each inference falls away.

1. Falsification and Manipulation of the Selection Criteria.

Focusing on MPC's selection criteria, Plaintiff argues that a fact finder could reasonably conclude that the criteria were falsified in that they were altered from poor-job-performance to least-experienced after the fact, as Lundgren and Delemontex realized that Plaintiff did not meet

the poor-job-performance criteria that they had initially adopted to cover-up a selection that was really based on pregnancy. Such a falsification of the criteria permits the inference of pretext. Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1168 (10th Cir. 1998) (manipulation or falsification of evaluations permits inference that responsible supervisor was animated by ageism). Alternatively, if the real criterion was "least-experienced," she argues that it was manipulated and misapplied in that she did not fit that rubric – if MPC really planned to lay-off the least experienced employee, Lang, the non-pregnant administrative assistant, would have been selected. Id. (facts permit inference that, "had employee potential been considered according to the employer's own RIF formula, they would have been retained"); Christie v. Foremost Ins. Co., 785 F.2d 584, 586-87 (7th Cir. 1986) (failure of defendant to comply with its own criteria allowed jury to conclude reduction-in-force was pretextual).

Plaintiff's facts will not stretch to support the inference of falsified criteria. Rather, the deposition testimony submitted by Plaintiff unambiguously establishes that the criteria – "least senior of the marketing team in terms of marketing experience" reflecting the need for "a more skilled team . . . in order to . . . move forward" – were set in advance of the decision and were adhered to in choosing Plaintiff. See Lundgren Dep. 57-9; Delemontex Dep. 149-51. Her best evidence of falsification[6] is the sentence in HR's post-hoc memorandum: "[o]verall this associate's development has not shown sufficient progress to support the business in the future."

[6] Plaintiff also points to the fact, readily admitted by Lundgren and Delemontex, that they did not review the performance evaluations of the various workers under consideration. This proves nothing other than confirming their testimony that Plaintiff was not selected based on a less-than-acceptable job performance. See Goldman v. First Nat. Bank of Boston, 985 F.2d 1113, 1118 (1st Cir. 1993) (fact that bank did not consider work performance unsatisfactory not material when discharge decision was based on who was least qualified employee in unit). Relatedly, Plaintiff tries to draw an inference from the failure of Lundgren and Delemontex to consult Gulesserian about the selection decision since she had supervised Plaintiff. This makes even less sense. Apart from the fact that Gulesserian was out on FMLA leave following the birth of her second child at the time of the selection, she was in the pool of employees on HR's potential lay-off list. Duchala Exh. 10. In any event, as Lundgren testified, with the rumor mill working overtime about the impending lay-offs, he had decided to consult as few people as possible. Lundgren Dep. 65.

Duchala Exh. 6. However, apart from being written after the fact by a non-decision maker, Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st Cir. 1991) ("focus must be on the perception of the decision-maker"), this sentence simply does not reflect or permit an inference of different selection criteria. Rather, it mirrors Delemontex's articulation of the criteria, which did not look at job performance, but did focus on the long-term potential of the employee selected for lay-off "to support the business in the future"; it is consistent with his testimony that the selection criteria reflected his need to retain the most experienced and skilled employees so his group could "produce more work with fewer resources" going forward. Delemontex Dep. 149-50. It is also consistent with Plaintiff's evaluations, in which she was praised for her job performance, at the same time that she was urged to get the education that she needed for long-term growth. ECF No. 34-6 at 12-19; PSUF ¶ 77; Delemontex Exh. 1-2, 7. It does not permit an inference of "deceit used to cover one's tracks," Ronda-Perez, 404 F.3d at 45, and does nothing to buttress the proposition that MPC's reason for selecting Plaintiff for lay-off was "not only a sham, but a sham intended to cover up [its] real . . . motive of discrimination." Bonefont-Igaravidez v. Int'l Shipping Corp., 659 F.3d 120, 124-25 (1st Cir. 2011).

As to the notion that Lang would have been a better choice, the evidence uniformly establishes that her name was not included on the list of product marketing group employees. Duchala Exhs. 6, 10. Rather, she was the only administrative support for "so many people," not just in the product marketing group but also in other areas of the business. Based on these extensive duties, her job could not be eliminated. Plaintiff's own testimony confirms that she turned to Lang as "our admin" to perform non-professional tasks. Greenman Dep. 153, 159. Plaintiff's only contrary evidence is a sentence in a draft about the "realignment," which mentions that Plaintiff and Lang would be "continuing to provide the day to day services

requested from our field sales offices." Lundgren Exh. 16. This document is not inconsistent with the undisputed evidence that Plaintiff was the least experienced member of the product marketing team, while Lang was an administrative assistant supporting a broad-based group in MPC's Warwick office and not on the ladder of the tiers of marketing professionals. In the end, Plaintiff offers nothing but her subjective opinion to rebut the evidence that Lang was not a member of the marketing team. See Dunn, 761 F.3d at 73; Lanigan v. Hallmark Health Sys., Inc., No. C. A. 14-11950-RGS, 2015 WL 2083358, at *7 (D. Mass. May 5, 2015).

With the evidence supporting the inference of falsified or manipulated selection criteria so flimsy, this Court's interpretation of what is enough for a viable RICRA claim must be guided by the caution of the Rhode Island Supreme Court:

> When analyzing an employer's attempt to reduce staff, other courts have noted the importance of allowing an employer to exercise its business judgment in terminating a member of a protected class: "There is little doubt that an employer, consistent with its business judgment, may eliminate positions during the course of a downsizing without violating Title VII even though those positions are held by member of protected groups (pregnant women included)."

Neri, 897 A.2d at 51 (quoting Smith, 76 F.3d at 422). Where, at bottom, it would require "unsupported speculation" to find discriminatory intent based on Plaintiff's arguments that the selection criteria were falsified or manipulated, Vasconcellos, 2008 WL 4601036, at *6, "whatever slight shadow of doubt may have been cast upon the proffered justification for [her] dismissal is too faint to raise the spectre of pretext." Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1119 (1st Cir. 1993). Accordingly, I find that Plaintiff's evidence fails to raise a colorable inference of false or manipulated selection criteria.

2. "Cover-Ups"

Plaintiff next argues that the failure of Lundgren and Delemontex to tell HR about her pregnancy prior to or during the April 30, 2012, meeting creates a fact issue regarding whether

they were covering it up. Relatedly, Plaintiff argues that the admitted confusion regarding the reason for the postponement of her lay-off date – supposedly based on the lay-off of Plaintiff's husband, who, as it turned out, was not laid-off – could permit a jury to find that Ridley, the head of HR, endorsed the delay, not because of the possibility that Plaintiff's husband would be laid off, but because HR had not previously been aware of the pregnancy and, having unmasked the cover-up, wanted to give the decision a second look. When this evidence is linked to the evidence that MPC's policy was not to alter a lay-off date based on FMLA leave, Plaintiff argues that the inferences may be drawn that Lundgren and Delemontex tried to prevent HR from learning of their selection of a pregnant employee for lay-off and that HR was so uncomfortable when the cover-up was exposed that it delayed the lay-off. Brennan v. GTE Gov't Sys. Corp., 150 F.3d 21, 29 (1st Cir. 1998) (failure to follow standard procedure is directly relevant to employee's burden of demonstrating pretext).

These inferences are problematic and improbable. See Vasconcellos, 2008 WL 4601036, at *3. It is illogical to posit that Lundgren and Delomontex would slyly fail to disclose the pregnancy to HR on April 30, 2012, and then aggressively reach out to HR and disclose the pregnancy just three weeks later. In any event, there is no evidence to support the proposition that HR halted the implementation of the lay-off. Rather, the evidence conclusively establishes that it was Lundgren who decided to delay the lay-off, and that HR merely concurred in his decision.

Even if the Court were to accept that these facts support such farfetched inferences, the remaining fly in Plaintiff's ointment is what happened next. With the supposed Lundgren/Delmontex cover-up of the pregnancy revealed (as a result of Lundgren's action), HR's second look resulted in the delay of the lay-off so that Plaintiff continued to have health

insurance, received all of the paid parental leave to which she was entitled and received the special ninety-day severance available to employees affected by the 2012 layoffs. HR's review did not result in the determination that the selection of Plaintiff for lay-off was based on an improper purpose – to the contrary, HR agreed with Lundgren's decision to delay the lay-off, but endorsed the Lundgren/Delemontex selection for lay-off of someone they now knew to be pregnant. Thus, while there certainly is a fact issue regarding why the lay-off was delayed, particularly where the stated reason reflected a deviation from MPC policy, that factual dispute does not logically give rise to an inference that the stated reason for Plaintiff's lay-off was a pretext for discrimination. Dunn, 761 F.3d at 73; Bonefont-Igaravidez, 659 F.3d at 124-25; see Neri, 897 A.2d at 51-52 (reasonable jurors could not infer gender-based animus from evidence that employer failed to adhere to staff reduction policy).

To summarize, no reasonable fact finder could conclude that Lundgren's failure to mention Plaintiff's pregnancy during the April 30 HR meeting, while raising it three weeks later, is evidence that the stated reasons for her lay-off were pretextual. Nor does the confusion over the reason for the delay of the lay-off prove more than that Lundgren, with Ridley's acquiescence, acted impulsively in their perhaps ham-handed attempt to do the right thing. Jordan v. Radiology Imaging Assocs., 577 F. Supp. 2d 771, 783-84 (D. Md. 2008) (Defendant's decision to postpone plaintiff's planned lay-off during her difficult pregnancy with quadruplets not evidence of pretext for termination at end of FMLA leave); see Luongo v. Lawner Reingold Britton & Partners, No. Civ. A. 93-10777-RWZ, 1995 WL 96901, at *1-3 (D. Mass. Mar. 6, 1995), aff'd sub nom. Luongo v. Britton, 70 F.3d 1252 (1st Cir. 1995) ("Even if genuine, none of these points demonstrate or even suggest that defendant's asserted reason is a pretext *for discrimination*.") (emphasis in original). I find that Plaintiff's "cover-up" evidence does not

permit the inference that the Lundgren/Delemontex stated reason for selecting Plaintiff was a pretext to mask their decision to lay her off because she was pregnant.

3. Plaintiff's Work Continued to be Performed

Plaintiff contends that she can show pretext from the evidence establishing that MPC had a continuing need for the work that she performing prior to the lay-off. In support of this argument, she points to evidence that her work was allocated to other employees, including to Gulesserian (who, having been pregnant, was in the same protected class), to a non-pregnant employee who ultimately required help from non-pregnant temps to get it all done, as well as to other non-pregnant temps who were constantly being brought in for stints in the product marketing group.[7] She relies on Rodriguez-Torres v. Caribbean Forms Mfr., Inc., which holds that, in a reduction-in-force case, to prove pretext on the ground that he was replaced, an employee must show that he was replaced by someone brought in from outside the company. 399 F.3d 52, 59 n. 4 (1st Cir. 2005) (citing LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993)). Because the use of temps amounts to the allocation of her work to someone brought in from outside the company, she contends that this evidence presents a trial-worthy issue.

Dunn dooms this argument; it holds that, in the context of a reduction-in-force, a plaintiff has to come forward with evidence beyond the mere fact that the employer laid her off and reassigned her duties to workers not in the protected class. 761 F.3d at 70; LeBlanc, 6 F.3d at 846 ("discharged employee is not replaced when another employee is assigned to perform the plaintiff's duties, or when the work is redistributed among other existing employees already

[7] Plaintiff complains that she was unable to develop evidence of temps brought in after Plaintiff was laid off because her motion to compel was denied. ECF No. 24. This is not accurate – the motion to compel was granted to the extent that MPC was ordered to provide the identity of any temps or independent contractors who amounted to "new costs" and were brought in to assume any of Plaintiff's duties during the three month period after Plaintiff was laid-off. Id. at 3. Plaintiff's motion to compel was denied only to the extent that it made the overbroad request for the identity of every temp who worked in any department in MPC's Rhode Island facility during the period from January 1, 2011, to the present.

performing related work"). "Merely demonstrating that, as a result of the reduction in force, the employer consolidated positions or allocated duties of discharged employees to other existing employees does not itself raise a reasonable inference that the employer harbored discriminatory animus toward any one employee." Lewis v. City of Boston, 321 F.3d 207, 216 (1st Cir. 2003). Even if the Court assumes that the temps were replacement workers from outside MPC, Plaintiff's evidence establishes only that her work was reallocated to existing staff and that there were an array of temporary workers helping them out both before and after the lay-offs. While she presents enough for a fact finder to conclude that some of the temps helped with tasks formerly done by Plaintiff; she has not demonstrated that a specific temporary worker was assigned to take over her responsibilities. See Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 318 (6th Cir. 2007) (where specific new hire takes on plaintiff's former job responsibilities, merely designating the new hire as "temporary" will not defeat sufficiency of *prima facie* case); Davis v. Mabus, 162 F. Supp. 3d 467, 475 (D. Md. 2016) (claimant replaced by part-time contractor who was not a federal employee has enough to establish *prima facie* case).

In any event, the argument founders because there is no dispute that MPC made a *bona fide* decision to proceed with cost-cutting lay-offs to eliminate $800,000 and that Lundgren received the directive to implement lay-offs before he or Delemontex were aware of Plaintiff's pregnancy. PSUF ¶¶ 92-93. Accordingly, Plaintiff's reliance on cases where there was a dispute regarding whether the reduction-in-force was real is unpersuasive. See Rodriguez-Torres, 399 F.3d at 59 n.4 (whether reduction-in-force rationale was a sham is disputed fact issue); Vasquez v. PMB Enters. W., Inc., No. CV-08-01555-PHX-NVW, 2010 WL 3419451, at *7 (D. Ariz. Aug. 26, 2010) (whether employer was really implementing purported reduction-in force is disputed fact issue). Plaintiff concedes that the only fact issue here is why she was selected

instead of another non-pregnant worker. Therefore, evidence that arguably permits an inference that the lay-off itself was pretextual is not material. Put differently, the parties' factual dispute over whether temps eventually were asked to assist the coworkers who ended up doing tasks formerly performed by Plaintiff is not relevant to whether the reason for Plaintiff's selection for lay-off was pretextual.

4. The Other Pregnant Employee Was Subject to Disparate Treatment

If it rested on competent admissible evidence, a potentially lethal arrow in Plaintiff's quiver would be her claim that the only other pregnant employee in the product marketing group was also subjected to adverse employment actions based on discriminatory animus. When there is competent proof of similar adverse treatment, courts have recognized that such actions may be circumstantial evidence of pretext in a case involving the same decision-maker's subsequent termination of another pregnant employee. Domenichetti, 2015 WL 58630, at *10 & n.5. (inference that plaintiff's hours were reduced due to pregnancy buttressed by evidence that another pregnant woman was recommended for reduction in force). Plaintiff contends that her factual proffer permits a reasonable fact finder to conclude that Gulesserian was demoted because she was pregnant and took FMLA leave.

The problem is that the facts do not support Plaintiff's conclusion. For example, Plaintiff's own testimony that, in March 2012, while she was pregnant and just before her second FMLA leave, Gulesserian told Plaintiff that she had been offered a demotion and pay cut proves nothing in that Plaintiff also testified to her belief that Gulesserian refused the demotion. Greenman Dep. 67-69 (Q: "Do you know whether or not she took that? A: I don't think she did").[8] Gulesserian herself emphatically denied ever telling Plaintiff that she had been offered a

[8] Because this testimony comes from Plaintiff, while Gulesserian herself denies saying it, the Court must examine whether the declaration can be ignored as inadmissible hearsay or whether it was made by Gulesserian within the

demotion or that she had been demoted. Gulesserian Dep. 59. To the contrary, Gulesserian testified that in between her two FMLA leaves, she learned that she would be promoted to the position of marketing manager. Gulesserian Dep. 61. Initially when she assumed this position, she continued to report to Delemontex and to supervise several of the product marketing group employees. Gulesserian Dep. 62. When she returned from the second FMLA leave in July 2012, Gulesserian was elevated again, no longer reporting to Delemontex, giving up supervisory duties in the product marketing group, instead reporting directly to Lundgren and concentrating her efforts on group sales, with an increase in pay. Gulesserian Dep. 102. As she explained it:

> Because the company's focus was on group. We did not have a lot of expertise that knew a lot about the group distribution. I was the only one that had some knowledge, and [Lundgren] wanted me to concentrate on that and to be able to interact and made headway within the group distribution and he felt I could do that.

Gulesserian Dep. 103. Later, when Lundgren retired, new supervisory duties were added to her responsibilities. Gulesserian Dep. 104. During her deposition, Gulesserian emphatically denied that her promotion and increase in pay could be understood as a "demotion" simply because she no longer had supervisory responsibilities. Gulesserian Dep. 106.

No reasonable fact finder could draw the inference from these facts that Gulesserian was treated adversely based on pregnancy-based animus. Worse for Plaintiff, the Gulesserian facts not only fail utterly to support pretext, but also constitute undisputed evidence that there were two pregnant women in the group to be affected by the lay-offs, one of whom was chosen for lay-off and one of whom was promoted. See Hepburn v. Brown Univ., C.A. No. 14-368 S, 2016

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scope of her employment, and therefore is an admissible party statement. See McDonough v. City of Quincy, 452 F.3d 8, 21 (1st Cir. 2006) (for statement to be party admission under Fed. R. Evid. 801(d)(2)(D), it must be made by employee of party acting within scope of employment). Because it is so clear that Plaintiff's testimony is insufficient to support the inference that MPC subjected other pregnant employees to discriminatory treatment, the hearsay question need not be resolved.

WL 1384818, at *3 (D.R.I. Apr. 7, 2016) (with no reason to doubt the sincerity of employer's conclusions forming basis for termination, summary judgment granted).

5. The Rest of the Evidence

What remains is not enough. For example, Plaintiff relies on her perception that Delemontex's reaction to hearing the news of the pregnancy was cold, including that he did not offer congratulations. It is well settled that it would be sheer speculation to hold that a supervisor's non-verbal reaction to the news of a pregnancy permits a reasonable inference of hostility to the news. O'Rourke v. Boyne Resorts, No. 12-CV-445-SM, 2014 WL 496859, at *9 (D.N.H. Feb. 7, 2014); see Vasconcellos, 2008 WL 4601036, *5 (applying RICRA, evidence that supervisor "seemed put off" based on tone and manner and decreased visits after pregnancy announced, with no evidence of specific negative comments, insufficient to avoid summary judgment). Plaintiff's testimony about Delemontex's reaction is insufficient to give rise to an inference of actionable animus on the part of the corporation.

That leaves temporal proximity. Plaintiff points to the undisputed fact that her announcement that she was newly pregnant and the Lundgren/Delemontex decision to select her to be laid off both occurred in April 2012. However, in Reilly v. Cox Enterprises, Inc., this Court held that temporal proximity is a factor to be considered but, standing alone, it cannot carry the day. C.A. No. 13-785 S, 2016 WL 843268, *3 (D.R.I. Mar. 1, 2016); see Fiske v. MeYou Health, Inc., No. Civ. A. 13-10478-DJC, 2014 WL 2818588, at *4, 7 (D. Mass. June 20, 2014) (temporal proximity buttresses inference that pregnancy played role in termination, when linked to fact that only pregnant employee laid off, coupled with supervisor's expression of concern whether she could continue to work). Accordingly, as the only fact left, temporal proximity is insufficient to support an inference of pregnancy-based animus.

In conclusion, it is clear that, however MPC may have stumbled in its apparent well-meaning attempt to do the right thing by Plaintiff, the record is devoid of facts supporting inferences sufficient for a fact finder to conclude that Plaintiff's pregnancy was the reason she was selected to be laid off. Accordingly, I recommend that the Court enter judgment in MPC's favor on the RICRA claim in Count I.

B. Counts II and III – Plaintiff's FMLA Claims

Plaintiff's secondary challenge to her lay-off is based on FMLA – she contends that she was laid off in retaliation for taking an FMLA leave and that MPC interfered with her leave by implementing the lay-off less than three weeks before her leave was scheduled to end.

To prevail on a claim for FMLA retaliation, a plaintiff must prove "by a preponderance of the evidence that the employer's adverse employment action was in retaliation for exercise of protected rights." Reilly, 2016 WL 843268, at *3; see Pagan-Colon v. Walgreens of San Patricio, Inc., 697 F.3d 1, 8 (1st Cir. 2012) (observing that, "a crucial component of an FMLA retaliation claim is some animus or retaliatory motive on the part of the plaintiff's employer that is connected to protected conduct"). With no direct evidence of FMLA retaliation, such a claim proceeds under the McDonnell Douglas burden-shifting framework. For a *prima facie* case, Plaintiff must show: (1) she availed herself of a protected FMLA right; (2) she was adversely affected by an employment decision; and (3) there was a causal connection between her protected conduct and the adverse action. Carrero-Ojeda v. Autoridad de Energia Electrica, 755 F.3d 711, 719 (1st Cir. 2014). If the evidence is sufficient for a *prima facie* case, and the employer (as MPC has done here) presents a justification for the adverse action, "the ultimate burden of proof remain[s] on the plaintiff to prove by a preponderance of the evidence that the employer's adverse employment action was in retaliation for exercise of protected rights."

Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 332 (1st Cir. 2005). Alternatively, courts sometimes use a "modified version" of McDonnell Douglas, which "focus[es] instead on whether the evidence as a whole is sufficient to make out a question for a factfinder as to pretext and discriminatory animus." Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 26 (1st Cir. 2004); Reilly, 2016 WL 843268, at *3.

Plaintiff's retaliation claim makes no sense in the circumstances presented by the undisputed facts in this case. Far from retaliating against Plaintiff based on the possibility of FMLA leave in the future, MPC manipulated the timing of the lay-off so she ended up getting almost all of the FMLA leave (including all of the fully paid parental leave). Beyond speculation, Plaintiff has presented no evidence from which a fact finder might infer a link between the leave and her selection for lay-off, which is essential for a *prima facie* case. Hodgens, 144 F.3d at 160. And if the Court assumes a *prima facie* case, the retaliation claim fails because there is no evidence establishing that her lay-off was a pretext for retaliation against her for taking an FMLA leave that Lundgren himself went out of his way to ensure that she got. See Domenichetti v. Premier Educ. Grp., LP, No. 12-CV-11311-IT, 2015 WL 58630, at *9 (D. Mass. Jan. 5, 2015) (plaintiff must show that employer's stated reason for termination was pretext for retaliating against him for having taken protected FMLA leave). With no proof that the pre-FMLA leave decision to include Plaintiff in the lay-off was a pretext, and undisputed evidence that the lay-off was part of a non-discriminatory corporate reorganization, I recommend that summary judgment enter in favor of MPC on the FMLA retaliation claim. See Deighan v. SuperMedia LLC, C.A. No. 14-264 S, 2016 WL 6988813, at *6 (D.R.I. Nov. 29, 2016) (retaliation claim fails due to absence of "specific facts" that proffered business need was actually a pretext masking a "retaliatory motive"); Jordan, 577 F. Supp. 2d at 786 (no inference

of pretext based on delay in telling plaintiff that she had been selected to be laid off during pregnancy with triplets so she could take FMLA leave before being laid off; court enters summary judgment on FMLA retaliation claim in favor of employer).

For FMLA interference, Plaintiff must demonstrate that she was denied substantive rights to which she was entitled under the Act. Colburn, 429 F.3d at 331-32. Unlike retaliation, "no showing as to employer intent is required." Id. at 331. To make out an interference claim, she must establish: (1) that she is an "eligible employee" under FMLA; (2) that she worked for an employer under FMLA; (3) that she was entitled to leave under FMLA; (4) that she gave adequate notice to her employer of her intention to take leave; and (5) that her employer denied her benefits to which she was entitled by the FMLA. Surprise v. Innovation Grp., Inc., 925 F. Supp. 2d 134, 145 (D. Mass. 2013).

Plaintiff's interference claim fails for the same reason that her RICRA and retaliation claims fail: because she has not presented evidence that MPC's stated reason for her selection to be laid off was pretextual, she is unable to prove that she was "entitled to leave under the FMLA." Reilly, 2016 WL 843268, at *5-6. The fact that Plaintiff requested leave does not insulate her from an otherwise legitimate termination. Id.; see Carrero-Ojeda, 755 F.3d at 722 ("the FMLA does not protect an employee from discharge for any reason while she is on leave – rather, as we discussed in the retaliation context, it protects her only from discharge because she requests or takes FMLA leave"); Henry v. United Bank, 686 F.3d 50, 55 (1st Cir. 2012) ("although an employee who properly takes FMLA leave cannot be discharged for exercising a right provided by the statute, she nevertheless can be discharged for independent reasons"). Accordingly, I recommend that the Court enter summary judgment in favor of MPC on Plaintiff's FMLA interference claim as well.

IV. CONCLUSION

Because Plaintiff has presented no competent evidence that would permit a reasonable fact finder to conclude that MPC's decision to select her for lay-off was concocted to mask the improper goal of getting rid of a pregnant worker or a worker entitled to FMLA leave or that MPC wrongly interfered with her right to an FMLA leave, I recommend that Defendant Metropolitan Property and Casualty Insurance Company's Motion for Summary Judgment (ECF No. 20) be GRANTED.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 22, 2017